THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya (AM)

I.T.A. No. 6856/Mum/2018 (Assessment Year 2012-13)

Shri Jaikishan Atalram Rupani 6th floor, Makhija Chamber 196, Turner Road, Bandra (W) Mumbai-400 050. PAN : AAIPR5741F	Vs.	ACIT 23(2) Matru Mandir Tardeo Mumbai 400 007.
(Appellant)		(Respondent)

Assessee by	Ms. Lipsa A. Chanchlani
Department by	Shri R. Bhoopathi
Date of Hearing	12.12.2019
Date of Pronouncement	17.02.2020

O R D E R

This appeal by the assessee is directed against the order of learned CIT(A) dated 24.9.2018 and pertains to A.Y. 2012-13.

2. Grounds of appeal read as under :-

"1. The Ld CIT (Appeals) has erred in holding that the allotment letter issued by the builder for booking rights coupled with part payment made towards purchase consideration did not constitute a capital asset in the hands of appellant relying on irrelevant consideration/erroneous interpretation of law.

2. The Ld CIT (Appeals) has erred in confirming the action of assessing officer in holding that the surplus received by appellant on cancellation of booking of a flat by the builder was not a capital receipt in the hands of appellant but was income chargeable to tax under the head income from other sources.

3. The Appellant craves leave to add/amend, alter and/or vary any of the grounds at the time or before hearing of this appeal.

4. The Appellant therefore prays that assessing officer may please be directed to hold that

i. The surplus/ compensation received by the appellant on surrender of his rights in a property (booking rights in flat) may please be directed to be held as capital receipt

ii. That consequential reliefs as per provisions of sec 54/54F may please be allowed."

3. Brief facts of the case are that the assessee is an individual and has made provisional booking of flat No. 5 situated on 12th Floor of building in "Satyam Residency" at Thane for a consideration of Rs. 30,58,640/-. Subsequently, booking of the flat was cancelled and the assessee got a sum of Rs. 15,66,000/- as compensation towards cancellation. Upon examining the documents in this regard the Assessing Officer was not satisfied. Hence, it was concluded that such provisional booking does not give rise to capital asset in the hands of the assessee. Hence, the said receipts were treated as 'income from other sources'. The assessee had claimed deduction u/s. 54 of the Act for making an investment in another flat. This claim was also denied and the learned CIT(A) was confirmed the same.

4. Against this order the assessee is in appeal before the ITAT.

5. I have heard both the counsel and perused the records. The submission of learned Counsel of the assessee is that the assessee had booked a flat vide allotment letter dated 10.4.2007. Out of the total cost of Rs. 30,58,460/- the assessee had paid Rs. 22,51,000/-. On cancellation of the allotment which was after 36 months the assessee got Rs. 38,17,000/- which mean that Rs. 15,66,000/- was surplus against surrender of assessee's right. Against this upon taking of another flat the assessee had claimed deduction u/s. 54F of the Act. Learned Counsel of the assessee placed reliance upon catena of case laws that in these circumstances relinquishment/surrender of rights gives rise to capital gain. Learned counsel referred to several decisions including decision of another owner in the same building Shri Girish P. Rupani (ITA No. 1028/Mum/2018 for A.Y. 2012-13) decided by the ITAT on 10.4.2019. In identical circumstances referring to several case laws the ITAT had decided the identical issue in favour of the assessee.

6. Per contra, learned Departmental Representative relied upon the orders of the authorities below.

7. Upon careful consideration I note that identical issue in the case of another owner in the same building was decided by the ITAT in favour of the assessee by elaborate order as under :-

> "6. We have considered the rival submissions of the parties and have gone through the orders of authorities below. We have also deliberated on the case law relied by ld. AR for the assessee and the ld. DR for the revenue. We have noted that there is no dispute that the assessee booked one flat on 10.04.2007 at the total cost of Rs. 20,88,519/-. The assessee paid Rs. 2,51,000/- on 02.04.2007 and further Rs. 13,00,000/- on 05.05.2007. Therefore, the assessee paid aggregate of Rs. 15,51,000/-. The assessee cancelled the booking and received Rs. 24,77,804/- against the payment of Rs. 15,51,000/- thereby the assessee earned a sum of Rs. 9,26,804/- over and above the payment made by him. The assessing officer treated the said sum of Rs. 9,26,804/- as interest, without making any investigation form the builder. The assessee treated the booking of flat as a capital asset and after claiming indexation over the capital gain and also claimed deduction under section 54 as the assessee claimed to have invested Rs. 34,00,000/- in acquisition of new residential plot. The Assessing Officer treated the additional amount/compensation as 'Income from Other Sources', consequently the benefit of section 54 was also denied. The ld. CIT(A) also confirmed the action of Assessing Officer by taking view that neither the conveyance-deed was executed nor the assessee has taken possession. The ld CIT(A) also concluded that the assessee has made a provisional booking as shown in the cancellation letter dated 25.07.2011.
>
> 7. Section 2(14) of the Act defines the word 'capital asset' mean 'property of any kind held by an assessee' whether or not connected with business or profession. The word 'transfer' in relation to a capital asset is defined under section 2(47) which include the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein. In our view the word 'property', is a term of widest import and signifying every possible interest which a person can clearly hold or enjoy, it has been held so by Hon'ble Apex Court in Ahmed GM. Ariff v. CWT [1970] 76 ITR 471 (SC).
>
> 8. The Hon'ble Jurisdictional High Court in PCIT vs. Vembu Vaidyanathan (supra) while considering the following question of law
>
>> "Whether on the facts and circumstances of the case and in law, the ITAT was justified in treating the gain arising from the sale of capital asset as Long Term Capital Gain without appreciating the fact that mere letter of allotment does not lead to creation of proper and effective right over the capital asset sought to be acquired, but only on execution of an agreement spelling out all the exact terms and conditions for acquisition".

The Hon'ble Court decided the above question by passing the following order:

> "2. This question arises in following background. The respondent-assessee is an individual. The assessee had filed the return of income for the assessment year 2009-10 and claimed long term capital gain arising out of capital asset in the nature of a residential unit. During the course of assessment the Assessing Officer examined this claim and came to the conclusion that the gain arising out of sale of capital asset was a short term capital gain. The controversy between the assessee and the revenue revolves around the question as to when the assessee can be stated to have acquired the capital asset. The assessee argued that the residential unit in question was acquired on the date on which the allotment letter was issued by the builder which was on 31st December, 2004. The Assessing Officer however contended that the transfer of the asset in favour of the assessee would be complete only on the date of agreement which was executed on 17th May, 2008.
>
> 3. CIT appeals and the Tribunal held the issue in favour of the assessee relying on various judgments of different High Courts including the judgment of this Court in case of Commissioner of Income-Tax, Bombay City I Vs. TATA Services Limited 1. Reliance was also placed on CBDT circulars.
>
> 4. Having heard learned counsel for the parties, we notice the CBDT in its circular No.471 dated 15th October, 1986 had clarified this position by holding that when an assessee purchases a flat to be constructed by Delhi Development Authority ("D.D.A." for short) for which allotment letter is issued, the date of such allotment would be relevant date for the purpose of capital gain tax as a date of acquisition. It was noted that such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances. It was noted that the allottee gets title to the property on the issue of allotment letter and the payment of installments was only a follow-up action and taking the delivery of possession is only a formality.
>
> 5. This aspect was further clarified by the CBDT in its later circular No.672 dated 16th December, 1993. In such circular representations were made to the board that in cases of allotment of flats or houses by co-operative societies or other institutions whose schemes of allotment and consideration are similar to those of D.D.A., similar view should be taken as was done in the board circular dated 15th October, 1986. In the circular dated 16th December, 1993 the board clarified as under:
>
> "2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No.471, dated 15-10-1986,

such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."

It can thus be seen that the entire issue was clarified by the CBDT in its above mentioned two circulars dated 15th October, 1986 and 16th December, 1993. In terms of such clarifications, the date of allotment would be the date on which the purchaser of a residential unit can be stated to have acquired the property. There is nothing on record to suggest that the allotment in construction scheme promised by the builder in the present case was materially different from the terms of allotment and construction by D.D.A.. In that view of the matter, CIT appeals of the Tribunal correctly held that the assessee had acquired the property in question on 31st December, 2004 on which the allotment letter was issued.

9. Further, the Hon'ble Bombay High Court in CIT vs. Vijay flexibl Container (186 ITR 693) while considering the question "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the amount of Rs. 1 lakh, being the compensation received by the assessee from B.V. Dhuru, cannot be treated as 'capital gains' in the hands of the assessee" passed the following order :

"3. Section 45 of the Income-tax Act, 1961 ('the Act') makes any profits or gains arising from the transfer of a capital asset chargeable to income-tax under the head 'Capital gains'. A capital asset is defined by section 2(14) of the Act to mean 'property of any kind held by an assessee'. The word 'transfer' in relation to a capital asset is defined by section 2(47) to include' the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein'. The Supreme Court held the word 'property', in Ahmed GM. Ariff v. CWT [1970] 76 ITR 471, to be 'a term of widest import and signifying every possible interest which a person can clearly hold or enjoy'. The issue that arises in this reference is:

Is the right conferred upon the assessee by the said agreement for sale 'property of any kind'?

4. Under the provisions of section 54 of the Transfer of Property Act, 1882, a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and it does not of itself create any interest in or charge on such property. Section 40 of the Transfer of Property Act states that where a third person is entitled to the benefit of an obligation arising out of contract annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration without notice of the right or obligation nor against such property in his hands. The illustration to section 40 reads, thus:

> "A, contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A."

5. In the case of Ram Baran Prasad v. Ram Mohit Hazra AIR 1967 SC 744, the Supreme Court held that it was manifest that a contract for the sale of immovable property did not create any interest in the immovable property. In Soni Lalji Jetha v. Soni Kalidas Davchand AIR 1967 SC 978, the Supreme Court came to the conclusion that a contract for sale of immovable property, while it did not create interest in immovable property, created a personal obligation of a fiduciary character which could be enforced by a suit for specific performance not only against the vendor but also against a purchaser for consideration with notice. The Madras High Court in Nochat Kizhakke Madathil Venkateswara Aiyar v. Kalloor Illath Raman Nambudhri AIR 1917 Mad. 358, held that an executory contract for the conveyance of land was not a mere right to sue. The right to sue was no doubt involved in it on breach of its stipulations, but before breach there was also the right to have the land conveyed. A mere right to sue was applicable only to cases where there had been a breach ending in damages and where the specific enforcement of the contract could not be obtained.

The afore going discussion leads, we think, to the conclusion that the right to obtain a conveyance of immovable property falls within the expression 'property of any kind' used in section 2(14) and is, consequently, a capital asset.

6. The very issue arose before this Court in CIT v. Tata Services Ltd. [1980] 122 ITR 594. The assessee there had entered into an agreement with A to purchase land and had paid earnest money. A was reluctant to complete the conveyance. Ultimately, a tripartite agreement was entered into between the assessee, A and X where under the assessee transferred and assigned in favour of X its right, title and interest under the agreement and received the sum of Rs. 5 lakhs as consideration and a further sum of Rs. 90,000 being the refund of earnest money. The question before the Court in reference was whether the transaction which brought the assessee the sum of Rs. 5 lakhs involved the transfer of a capital asset and gave rise to a capital gain. The Court noted the definitions of 'capital asset' and 'transfer' under the Act. It noted that a contract for the sale of land was capable of specific performance and was assignable and, in this behalf, relied upon the Madras High Court judgment aforementioned. It concluded that a right to obtain conveyance of immovable property was property as contemplated by section 2(14) . It held that the amount of Rs. 5 lakhs had been received by the assessee as consideration for assigning its rights under the agreement, which fell within the wide definition of 'capital asset' in the Act. It also held that the earnest money paid by the assessee to A was the consideration for which the property under the agreement had been acquired.

7. The decision in the case of Tata Services Ltd. (supra) was followed by this Court in CIT v. Sterling Investment Corpn. Ltd. [1980] 123 ITR 441. This was a case where the assessee had entered into an agreement to purchase immovable property and had paid earnest money. Matters dragged on. Ultimately, an agreement was reached and only the sum of Rs. 10,000 was returned to the assessee. The assessee claimed before the tax authorities that it had lost the balance of the earnest money that it had paid and that this was a capital loss. This Court was called upon on reference, to decide whether this was correct. It considered the definition of 'capital asset' under the Act and held that the contractual right of the purchaser to obtain title to immovable property for a price, which right was assignable, had to be considered to be 'property' and, therefore, a 'capital asset'. In this behalf reference was made to the judgment in the case of Tata Services Ltd. (supra). The Court rejected the argument that if the right to purchase was given up and the vendor was relieved of his obligation, there would be no capital gain. The Court approved of what had been said in the case of CIT v. Rasiklal Maneklal (HUF) [1974] 95 ITR 656 (Bom.), in regard to the essential features of a transaction of relinquishment, namely, that the property in which the interest was relinquished continued to exist; it continued to be owned by some person or persons even after the transaction of the relinquishment and the interest of the person relinquishing his interest in the property was given up or abondoned or surrendered. The Court held that the loss to the assessee which had arisen out of the forfeiture of the earnest money that had been paid by it was not allowable as a capital loss.

8. The decisions in the cases of Tata Services Ltd. (supra) and Sterling Investment Corpn. Ltd. (supra) negative all the three submissions that have been made before us by Mr. Zaveri, the learned counsel for the assessee, namely, that no capital asset was acquired by the assessee as a result of the said agreement for sale; that, in the alternative, there was no transfer of a capital asset; and that, in the further alternative there had been no capital gain because there had been no cost of acquisition of the capital asset. Mr. Zaveri, therefore, attempted to persuade us to take a view different from that taken by this Court in the afore mentioned cases. While we are not persuaded to do so, we must record that it is his industry which has brought to our attention the decisions that we refer to in this judgment.

9. The Delhi High Court in the case of CIT v. R. Dalmia [1987] 163 ITR 517, considered the question as to whether the right acquired by the assessee under agreements to sell immovable property was not a proprietary right. Following the earlier judgment of the Delhi High Court in CIT v. J. Dalmia [1984] 149 ITR 215, it was held that the right acquired by the assessee under the agreements to sell had to be held not to be a proprietary right and, hence, not a capital asset. In the earlier judgment of the Delhi High Court the facts were that one 'K' had entered into an agreement with contractors for the construction of

a building upon land owned by them and the sale thereof to him. Earnest money was paid. In exercise of the right to have the conveyance executed in the name of a nominee, the assessee was nominated. The assessee was constrained to file a suit against the contractors for an injunction against selling the property to third parties and he obtained an injunction. When the suit reached hearing, parties agreed to go to arbitration and the assessee gave up his claim for specific performance of the agreement and retained his right to claim damages. The arbitrator awarded damages to the tune of Rs. 1,02,500. The question before the Court was whether the amount of Rs. 1,02,500 could be assessed to tax as a capital gain. The Delhi High Court noted the judgment of this Court in the case of Tata Services Ltd. (supra) and distinguished it on facts. The Court said that in the case before it, it had to determine whether the damages received by the assessee were in respect of a capital asset. There was a breach of contract and the assessee received damages in satisfaction thereof. He had a mere right to sue for damages. Assuming the same to be property it could not be transferred under section 6(e) of the Transfer of Property Act.

10. Having regard to the statutory provisions and the authorities which we have cited above, we cannot, with respect, agree that the right acquired under an agreement to purchase immovable property is a mere right to sue. The assessee acquired under the said agreement for sale the right to have the immovable property conveyed to him. He was, under the law, entitled to exercise that right not only against his vendors but also against a transferee with notice or a gratuitous transferee. He could assign that right. What he acquired under the said agreement for sale was, therefore, property within the meaning of the Act and, consequently, a capital asset. When he filed the suit in this Court against the vendors he claimed specific performance of the said agreement for sale by conveyance to him of the immovable property and, only in the alternative, damages for breach of the agreement. A settlement was arrived at when the suit reached hearing, at which point of time the assessee gave up his right to claim specific performance and took only damages. His giving up of the right to claim specific performance by conveyance to him of the immovable property was relinquishment of the capital asset. There was, therefore, a transfer of a capital asset within the meaning of the Act. We may at this stage also deal with the further argument that there was no consideration for the acquisition of the capital asset. In our view, this Court was right in the view that it took that the payment of earnest money under the agreement for sale was the cost of the acquisition of the capital asset.

11. Our attention was invited by Mr. Zaveri to the judgment of the Andhra Pradesh High Court in CIT v . Barium Chemicals Ltd. [1987] 168 ITR 164/31 Taxman 471. The facts there were that the assessee had entered into an agreement with an English company for the erection of a plant. Trial runs of the plant showed that the plant was defective. In the meanwhile the English company had left the erection

site. Negotiations resulted in a settlement whereby the English company paid to the assessee sums aggregating to Rs. 47,20,939. As a condition, the assessee waived its claim against the English company. The Court held that these sums could not be brought to tax as capital gains. This decision was rendered in the context of the findings that the business of the assessee was in the chemicals that the plant was expected to produce, that the settlement could not be treated as being in the ordinary course of the business of the assessee and that there had been a sterilisation of the assessee's capital assets in that the English company had not erected the plant according to stipulation. The decision was, therefore, rendered upon the particular facts of that case, which are not akin to the facts before us.

12. In CIT v. Ashoka Marketing Ltd. [1987] 164 ITR 664, the Calcutta High Court held upon the facts that there had been no element of cost in the acquisition for which the sum of Rs. 1 lakh was paid as liquidated damages under an agreement to purchase property. In CIT v. Dhanraj Dugar [1982] 137ITR 350, the facts before the Calcutta High Court were unusual. The assessee was a broker of immovable property. He entered into an agreement with three other persons for the purchase of an immovable property which was to be developed and resold. The assessee was not to pay any part of its purchase price. There were disputes between the four persons and the assessee filed a suit claiming partition. Upon a settlement the assessee received Rs. 1 lakh. The question was whether the sum of Rs. 1 lakh was received by the assessee from his normal business as a broker or upon the distribution of a capital asset. The Court held that even if there was any transfer of a capital asset by reason of the settlement, it had not cost the assessee anything in terms of money and so the question of computation of a capital gain could not arise. This decision was rendered upon its own facts.

13. There remains for consideration a decision of the Gujarat High Court in CIT v. Hiralal Manilal Mody [1981] 131 ITR 421, which Mr. Zaveri cited. The question in this case was whether the damages received by the assessee for breach by the seller of an agreement to purchase immovable property was a revenue receipt. The assessee, had been held by the Tribunal not to be a dealer in immovable property. The Court found that the Tribunal had applied the correct legal tests in arriving at its conclusion that the assessee had not been proved to be a dealer in immovable property and, accordingly, it held that the amount which he had received by way of damages was not a revenue receipt. Having regard to the nature of the controversy before the Court, this case does not render us any assistance.

14. We see, with respect, no convincing reason to take a view other than that which has been taken by this Court in the cases of Tata Services Ltd. (supra) and Sterling Investment Corpn. Ltd. (supra) . We must, hold, therefore, that the assessee acquired a capital asset by reason of the said agreement for sale, that there was a transfer of that capital asset when the assessee entered into consent terms and

relinquished it, and that the capital asset had been acquired for the cost of Rs. 17,500 paid as and by way of earnest money under the said agreement for sale.

15. The question that is posed asks whether the amount of Rs. 1 lakh can be treated as a capital gain in the hands of the assessee. We find that the ITO had deducted from out of the total sum of Rs. 1,17,500 received by the assessee under the consent terms the amount of Rs. 17,500 as being the cost of acquisition of the asset and the sum of Rs. 17,904 on account of expenses and legal charges. The assessment was made by him, rightly, on the basis that the capital gain was of Rs. 82,086. Accordingly, we answer the question thus: the amount of Rs. 82,086 shall be treated as a capital gain in the hands of the assessee."

10. Considering the decision of jurisdictional High Court as referred above, we are of the view that the assessee on booking acquired a right in the asset on 10.04.2007. The asset/interest in asset/ flat was surrendered in 25th July 2011, therefore, the assessee retained right in the asset for more than 36 month, therefore, the assessee was qualified for claiming LTCG on cancellation/surrender of such asset and the compensation so received is qualified for LTCG.

11. The case law relied by ld. DR for the revenue in case of Shobha jain Vs CIT (supra) in our view is not applicable on this grounds of appeal. The facts of this case are entirely based on different facts. In the said case, the dispute was with regard to disallowance under section 54F. The assessing officer disallowed the exemption holding that it is permissible only in respect of residential house is purchased or constructed within the stipulated period. The assessee has shown agreement for purchase of land. And the assessee failed to show that there was transfer of property by execution of sale deed. The Tribunal recorded a clear finding that there was no sale of property in dispute for the reasons that no document of sale deed was placed before the revenue authority. Moreover, the assessee in the present case claimed right in the asset, which was remained in the ownership of assessee for more than 36 month when it was relinquished/ surrendered. In the result, ground no.1 of the appeal is allowed.

12. Ground No.2 raised in alternative to ground no.1. Once we have allowed the ground no.1, therefore, the discussions on ground no.2 have become academic. Ground No.3 is general in nature, hence, need no discussion and adjudication.

13. Ground No.4 relates to consequential benefit of deduction under section 54/54F. Considering the fact that we have allowed the ground no.1 of appeal in favour of assessee, therefore, we direct the Assessing Officer to verify the fact in accordance with the provision of section 54/54F and grant the exemption to assessee in accordance with law."

8. Since the facts are identical, following the above said precedent, I set aside the orders of the authorities below and decide the issue in favour of the assessee.

9. In the result, appeal filed by the assessee stands allowed.
Order has been pronounced in the Court on 17.02.2020.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 17/2/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

PS